# INDEX



## CITATIONS





687836—46——1

# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 805

JULIAN LENTIN, DOING BUSINESS AS J. LENTIN LUMBER COMPANY, PETITIONER

*vs.*

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, FOR AND ON BEHALF OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

No opinion was rendered by the district court. Its findings of fact and conclusions of law are set forth at pages 252–254 of the Record. The opinion (R. 284–292) of the circuit court of appeals is reported in 151 F. 2d 615.

### JURISDICTION

The judgment of the circuit court of appeals was entered on November 9, 1945 (R. 293), and a petition for rehearing (R. 297–304) was denied

on December 5, 1945 (R. 305). The petition for a writ of certiorari was filed on February 5, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 25, 1925.

## QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial by reason of alleged prejudice on the part of the trial judge.

2. Whether petitioner sold a commodity at a price in excess of the legal maximum and was therefore liable for statutory damages under Section 205 (e) of the Emergency Price Control Act.

3. Whether the trial court improperly excluded or failed to consider any relevant evidence.

4. Whether the trial court properly computed the amount of the overcharges exacted by petitioner in selling lumber at prices in excess of the legal maximum.

5. Whether a judgment for $45,665.94, being twice the amount of overcharges exacted by the petitioner in selling lumber at prices in excess of the legal maximum prices, is authorized by Section 205 (e) of the Emergency Price Control Act and if so whether the statute violates the Fifth Amendment.

6. Whether the trial court erred in enjoining the petitioner from violating the Emergency Price Control Act of 1942 as amended.

## STATUTE AND REGULATIONS INVOLVED

Section 205 (e) of the Emergency Price Control Act of 1942, as amended, and the pertinent provisions of the applicable regulations of the Price Administrator are set out in the Appendix, *infra*, pp. 12–16.

## STATEMENT

This action was brought by the Price Administrator to enjoin the petitioner pursuant to Section 205 (a) of the Emergency Price Control Act from violating the Act and to recover statutory damages under the provisions of Section 205 (e) of the Act as a result of the alleged sale by the petitioner of 28 carloads of Mexican ponderosa pine at prices in excess of those permitted by Maximum Price Regulation 94 and one carload of white oak flooring at prices in excess of those permitted by Maximum Price Regulation 458 (R. 3–9). The Mexican ponderosa pine was purchased by petitioner f. o. b. El Paso, Texas, from Pan-American Trading Company (hereinafter called Pan-American) of Kansas City, Missouri (R. 35, 131).

After a trial without a jury, the district court found that petitioner between October 20, 1943, and April 27, 1944, had purchased and sold lumber at prices in excess of the maximum prices established by the respective regulations; that the sales were not made to purchasers for use or consumption other than in the course of trade or business; that the sales and purchases at prices in excess

of the lawful maximum prices were knowingly and wilfully made by petitioner and were known by him to be in violation of the respective regulations; that the testimony of petitioner with respect to his purchases and sales of lumber was false in material respects; and that the amount by which the prices received by petitioner exceeded the applicable maximum prices therefor was $22,832.97 (R. 252–253). The court, therefore, entered judgment in favor of the respondent for twice this amount ($45,665.94) and enjoined the petitioner from violating the Act (R. 254).

The circuit court of appeals affirmed the judgment, holding that petitioner had received an impartial trial; that respondent was not estopped from maintaining the action; that in respect to the lumber involved in the action petitioner was not a broker or factor; that the trial court had not excluded or failed to consider any relevant evidence; that the overcharges exacted by petitioner had been correctly computed by the trial court; and that the trial court had not abused its discretion either in entering judgment for twice the amount of the overcharges or in issuing an injunction (R. 284–292).

## ARGUMENT

The decision of the court below is correct, and there is no conflict of decisions. The questions which petitioner seeks to raise are not of great importance and consist largely of questions of

fact which have been resolved against him by the concurrent findings of the two lower courts.

1. The record contains no support whatever for petitioner's assertion that the trial judge was prejudiced "against petitioner's case, as belonging to a class of cases" (Pet. 12). It is true that the judge made several remarks which were critical of the petitioner. These remarks were made only during the closing stages of the trial and reflected the judge's view of what the evidence disclosed. There is nothing to indicate that petitioner did not receive a fair trial or that the judge was prejudiced either against petitioner or against any class of cases. At most, the court's remarks expressed a disapproval of petitioner's acts and conduct not only before but during the trial. They fall far short of disclosing bias or prejudice. Cf. *Glasser* v. *United States,* 315 U. S. 60, 83.

2. There is no merit in the contention (Pet. 7, 8, 12) that in respect to the lumber involved in this action petitioner was a broker or factor and not a seller and therefore not liable for statutory damages under the provisions of Section 205 (e) of the Act. Both the district court (R. 253) and the circuit court of appeals found "that Pan-American sold and defendant [petitioner] purchased the lumber, and that he in turn sold it to his customers" (R. 288). These concurrent findings of the two lower courts are amply sup-

ported by the evidence, and there is nothing in the record which would warrant disturbing them. Cf. *Baumgartner* v. *United States*, 322 U. S. 665, 670.

3. The trial court did not exclude or fail to consider relevant evidence (cf. Pet. 7, 12–13). The court excluded evidence of the fact that petitioner had distribution yard facilities. This evidence was offered with a view of invoking Section 1381.502 of the Maximum Price Regulation 94 which provides that the regulation "does not apply to sales out of distribution yard stock." But the same section also provides that "a sale is considered out of distribution yard stock only if the lumber was a part of regular yard stock at the time the sale was made." None of the lumber involved in this action was ever in a distribution yard. The proffered evidence, therefore, was plainly irrelevant. The court also rejected petitioner's offer to prove that some of the lumber was of a higher grade than that shown on the invoices issued by Pan-American to petitioner and by petitioner to his customers. In view of the fact that the applicable regulation (Maximum Price Regulation 94) expressly provides that, "failure to invoice properly is just as much a violation of this regulation as charging an excessive price" [Sec. 1381.505], petitioner was bound by the invoices. The rejected evidence therefore had no tendency to prove either that petitioner did not

violate the regulation or that he did not wilfully do so.[1]

Nor was there any error in declining to hold that the petitioner had not wilfully violated the regulations because of his alleged reliance on a press release issued by the Office of Price Administration explaining Amendment 8 to Maximum Price Regulation 94, or because of his alleged reliance on advice which he claimed was given him by one Huntley, an employee of the Office of Price Administration (cf. Pet. 8, 13). The press release states that "there are no price ceilings on purchases of Mexican pine lumber outside the United States" (R. 42). Petitioner did not buy or sell the Mexican pine lumber outside of the United States. He purchased it from Pan-American f. o. b. El Paso, Texas and sold it in the United States (R. 20–23, 35–36, 131, 146, 150, 186, 187). As the court below said, "Not even the most generous interpretation could bring defendant within the cloak of such an authorization" (R. 287). As for petitioner's alleged conversation with Huntley, in the course of which petitioner claimed that Huntley had

[1] Section 205 (e) of the Act, as amended, provides that if a defendant charged with selling a commodity at a price in excess of that established by a maximum price regulation proves that his violation of the regulation was neither wilful nor the result of a failure to take practicable precautions to prevent the occurrence of the violation, his liability shall be restricted to the amount of the overcharges exacted or $25, whichever is the greater.

687836—46——2

advised him that there were no price restrictions on imported lumber, it is sufficient to say that Huntley denied categorically that he gave petitioner any such advice (R. 216–218) and, as the court below observed (R. 290), the trial court preferred to credit Huntley's testimony.

4. Petitioner's contention (Pet. 7, 8, 9, 14–15) that the trial court incorrectly computed the amount of the overcharges exacted by petitioner is untenable. Petitioner tacitly concedes, as he did in the court below, that the overcharges in respect to all but nine of the twenty-eight carloads of Mexican ponderosa pine lumber were correctly computed. In respect to the nine carloads, he claims that the evidence did not sufficiently disclose the amount of the overcharges collected (Pet. 4–5). We submit that the contrary is the fact. The proof which petitioner contends is inadequate consisted of:

(a) The bank drafts listed in plaintiff's Exhibit 58, which show that the nine cars of lumber in question were purchased and the prices paid therefor (R. 143, 149; see R. 271–272, 274, 310).

(b) The petitioner's testimony (R. 146) that he sold the nine carloads for the same price and on the same terms and conditions as the remaining nineteen cars.

(c) Plaintiff's Exhibits 4 to 23 inclusive which show the prices at which petitioner sold the remaining nineteen cars (R. 88, 89, 107, 142; see R. 271–272, 274, 310).

(d) The orders for all twenty-eight carloads (Pl. Exs. 4 and 30) which show the grade of lumber ordered, the amount paid per 1000 board feet, and the kind of lumber in each car (R. 89, 177, 84–85, 147–148, 149, 210, 232; see R. 271–272, 274, 310).

The evidence, therefore, showed all the facts necessary to compute with reasonable accuracy the amount of the overcharges, namely, the amount and kind of lumber sold, what it was sold for, and the maximum selling price established by the regulation.

5. Contrary to petitioner's views (Pet. 8, 15), no error was committed in entering judgment against petitioner for $45,665.94 notwithstanding the fact that the profit which petitioner realized from the illegal transactions amounted to only $3,000. Section 205 (e) of the Act fixes the liability of one who sells a commodity at a price in excess of the legal maximum at not less than the amount of the overcharge nor more than three times the amount. Here the judgment was for only twice the amount of the overcharges.

In providing for such a recovery the Act violates no constitutional guarantee. *Gurman* v. *Illg and Bowles,* No. 98, present Term, certiorari denied October 8, 1945; cf. *United States* ex rel. *Marcus* v. *Hess,* 317 U. S. 537; *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390; *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 112. Concededly, in certain circumstances, the requirements of due

process forbid the imposition of cumulative fines for the violation of a statute or administrative order pending an attempt to test its validity in the courts and for a reasonable time thereafter. *Natural Gas Co.* v. *Slattery,* 302 U. S. 300, 310. But that principle has no application where administrative relief has not been sought and where, as here (*Yakus* v. *United States,* 321 U. S. 414), an adequate procedure for judicial review of a regulation is provided and the defendant fails to avail himself of it. *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams,* 251 U. S. 63, 65; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651; *Gulf C. etc. Ry. Co.* v. *Texas,* 246 U. S. 58.

It may also be conceded that a statute imposing penalties may be unconstitutional under the Eighth Amendment if the penalties are so disproportionate to the offense as to be excessive. But in cases such as this, the validity of the statute is not to be tested by contrasting the penalty with the amount of the overcharge but by the public interest in having the statute obeyed and the relation of the penalty to that object. *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams,* 251 U. S. 63, 67. When tested by that standard, the liability imposed by Section 205 (e), even if it could be classed as a fine within the meaning of the Eighth Amendment, cannot be said to be excessive. *Gulf C. etc. Ry. Co.* v. *Texas,* 246 U. S. 58.

6. Finally, the trial court did not err in issuing an injunction (cf. Pet. 8, 9, 16). The decision of the court below is in no sense in conflict with

the decision of this Court in *The Hecht Company* v. *Bowles,* 321 U. S. 321. This Court there held that whether an injunction should issue to restrain violations of the Emergency Price Control Act rests in the sound discretion of the trial court. Here the court below after an examination of the record held that the trial court did not abuse its discretion, and petitioner can point to nothing in the record to indicate that its decision is erroneous. The fact that petitioner had ceased to violate the Act is not of itself a sufficient reason to refuse an injunction. *The Hecht Company* v. *Bowles, supra.*

### CONCLUSION

The decision of the court below is clearly right and does not involve any question of great importance. There is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
*Solicitor General.*
WALTER J. CUMMINGS, JR.,
*Special Assistant to the Attorney General.*
MILTON KLEIN,
*Director of Litigation,*
DAVID LONDON,
*Chief, Appellate Branch,*
A. M. DREYER,
*Attorney,*
*Office of Price Administration.*

MARCH 1946.

## APPENDIX

Section 205 (e) of the Emergency Price Control Act of 1942, 56 Stat. 23, 33, 50 U. S. C. App. (Supp. IV), 901 *et seq.*, as amended by Section 108 (b) of the Stabilization Extension Act of 1944, 58 Stat. 640, 50 U. S. C. App. (Supp. IV), 925 (e), provides as follows:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occur-

rence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

The pertinent provisions of Maximum Price Regulation 94, 7 F. R. 10848, as amended, are as follows:

§ 1381.501 *Sales of Western pine and associated species of lumber at higher than maximum prices prohibited.* (a) On